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183393—33——1

In the Supreme Court of the United States

OCTOBER TERM, 1933

No.—

FEDERAL TRADE COMMISSION, PETITIONER

v.

ALGOMA LUMBER COMPANY, BIG LAKES BOX COMPANY, California Fruit Exchange, Clover Valley Lumber Company, Davies-Johnson Lumber Company, Diamond Match Company, Ewauna Box Company, Feather River Lumber Company, Hobart Estate Company, Lassen Lumber & Box Company, Pelican Bay Lumber Company, and Red River Lumber Company, respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General and the Chief Counsel of the Federal Trade Commission, on behalf of the Commission, pray that a writ of certiorari issue to review the decree of the Circuit Court of Appeals

for the Ninth Circuit, entered in this cause on April 4, 1933, which set aside the orders of the Federal Trade Commission requiring the Algoma Lumber Company and the eleven other respondents named above to cease and desist from certain alleged unfair methods of competition.

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 1889) is reported in 64 F. (2d) 618.

JURISDICTION

The decree of the Circuit Court of Appeals was entered April 4, 1933 (R. 1899). The jurisdiction of this Court is invoked under Section 5 of the Federal Trade Commission Act, c. 311, 38 Stat. 717, 719 (U.S.C., Title 15, Sec. 45), and under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether respondents' use of the commercial name "California white pine" is, under the circumstances of this case, an "unfair" method of competition.

(2) Whether the statutory requirement that the proceeding be "to the interest of the public" permits the court or the Commission to consider, or to give dominant consideration to, the probable effect of the Commission's order upon conservation of natural resources.

(3) Whether the court in reviewing an order of the Commission may, without holding that any of the Commission's findings of fact are not supported by testimony, weigh and appraise the evidence for the purpose of independently determining for itself, upon the evidence, whether the method of competition employed is unfair.

STATUTE INVOLVED

The material portions of Section 5 of the Federal Trade Commission Act are set forth in the Appendix, *infra,* pp. 17–20.

STATEMENT

Respondents are twelve of a large group of manufacturers on the Pacific Coast against which the Commission issued similar complaints on May 23, 1929, charging that their interstate sale of ponderosa pine under the name "California white pine" was an unfair method of competition (R. 5). After testimony had been taken before an examiner, the Commission entered orders against 39 corporations, including the 12 respondents, directing them to cease and desist from using the word "white" in conjunction with the word "pine" in connection with the interstate sale of lumber manufactured from ponderosa pine. The findings of the Commission upon which these orders were based may be summarized as follows:

Botanists, foresters and the buying public have long known certain pine species and the lumber

made therefrom as "white pines." The commercial "white pines" are the Northern white pine, the Idaho white pine, and the sugar pine. This grouping is confirmed by the cell structure of the wood (pars.[1] 5–7, R. 28–29). Northern white pine is also known by various other trade names, each of which includes the phrase "white pine" (par. 8, R. 29).

Lumber of the white pine species has a high degree of uniformity of qualities as a group and is preeminent for its high average of the following characteristics:

> Durability under exposure to weather and to other conditions of moisture, a great proportion of heartwood content as contrasted with sapwood content, lightness of color, lightness in weight, softness and evenness of texture, closeness and fineness of grain, freedom from resinous content, from shrinkage * * * and warping (par. 9, R. 29).

The public has long associated and still associates with lumber marketed under terms which include the words "white pine" the qualities above mentioned (par. 19, R. 31). In contrast with these qualities, ponderosa (respondents' wood) is not botanically a white pine (par. 26, R. 32), and its lumber has a high degree of variability, so that an order therefor may be filled with lumber of widely divergent qualities (pars. 35–41, R. 34–36). On an

[1] The numbered paragraphs of the Commission's findings will be referred to by the abbreviation "Par."

average, it shrinks and warps more, has greater resinous content, less softness and lightness in color and weight and less workability, than true white pine (pars. 42–44, R. 36). Ponderosa lumber also has a far less proportion of heartwood than that of the true white pines, the heartwood being the more durable portion of lumber (pars. 45–52, R. 36, 37). The public believes that white pine has great durability where exposed to the weather. This reputation is borne out by experience. In contrast with true white pine, ponderosa does not enjoy a reputation for durability where exposed to the weather and in practice becomes unserviceable in comparatively few years (pars. 53–57, R. 37, 38).

Ponderosa lumber, particularly in its sapwood content, resembles true white pine in appearance and is used for purposes for which true white pine is used. It is excellent for inside finish (pars. 58–59, R. 38). Ponderosa lumber was given terms which included the words "white pine" in other than far western trade in 1900 and by 1915 was so designated in national distribution. The original purpose for the adoption of this term was to distinguish this lumber from the hard "yellow pine" of the South. The purpose actuating its continuance is to associate this lumber with the true white pines in the public mind. Since 1924, however, more than half of the ponderosa lumber marketed has been sold as "Pondosa pine" (pars. 30–33, R. 33, 34). The true white pines, on account of

their superiority for certain purposes and their comparative scarcity, have consistently brought higher prices than ponderosa (par. 61, R. 39).

A substantial number of the retailers of lumber do not know that the so-called "California white pine" is not a true white pine and does not possess the true white pine qualities and are confused and misled by the use of that term for ponderosa lumber. Other retailers, who realize the distinctions, are aided in selling ponderosa upon orders for "white pine" by the use of trade terms for ponderosa which include the words "white pine." They are induced to this course by the price differential (pars. 64–69, R. 40, 41). The general public and most architects do not have the technical knowledge to distinguish ponderosa lumber, particularly in its sapwood content, from true white pine. They desire true white pine quality and usually order "white pine" for exterior uses. They actually receive in many instances, and in the regular practice of many retailers, ponderosa as "California white pine", in the belief that it is true white pine. Although the term "California white pine" has long been used for ponderosa lumber, it is still misleading and confusing to almost the entire buying public (pars. 70–74, R. 41, 42).

Use of the words "white pine" for this lumber has a money advantage because it associates the lumber with true white pine. Manufacturers selling white pine are placed at a trade disadvantage

by the use of trade terms which include the phrase "white pine" for the lower priced and, for certain purposes, inferior ponderosa lumber. Manufacturers selling ponderosa under the trade term "pondosa pine" also lose sales. Retailers prefer to stock with ponderosa coming to them under a trade term which includes the words "white pine" because it can be sold more easily as white pine. The public confidence in true white pine is thus lessened and the market for both true white pine and ponderosa is impaired for the respective purposes for which they are best adapted (pars. 73–80, R. 42. 44).

The court below set aside the Commission's orders. It stated that it did so upon the ground that the testimony did not support what it termed the Commission's "findings" that respondents' method of competition was unfair and that the proceeding would be in the interest of the public (R. 1899).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

(1) In reviewing the testimony without reference to the Commission's specific findings of fact, but for the purpose of determining whether the Commission's conclusion that respondents' method of competition is unfair was supported by testimony.

(2) In weighing the evidentiary value of nomenclature approved by the Bureau of Standards.

(3) In holding that the testimony is insufficient to support the Commission's findings that respondents' use of the commercial name California white pine "is an unfair method of competition or that its prevention would be in the interest of the public", without having held that any of the Commission's specific findings were unsupported by substantial evidence, or that the Commission's findings did not support its orders.

(4) In disregarding the provisions of the Federal Trade Commission Act that the Commission's findings of fact shall be conclusive "if supported by testimony."

(5) In holding that the indirect effect of the Commission's order upon the conservation of forests is a relevant consideration in determining whether the proceeding was "to the interest of the public".

(6) In setting aside the cease and desist orders of the Commission.

REASONS FOR GRANTING THE WRIT

I. This case presents two questions of law of general importance which have not been, but should be, decided by this Court. The first concerns the circumstances under which the use of a commercial name which may and does mislead purchasers, to the detriment of competitors, is an unfair method of competition.

Botanically pine is divided into two general classifications, white pine and yellow pine. Respondents make and sell in interstate commerce lumber from *pinus ponderosa*. This is botanically a yellow pine but, from the standpoint of its industrial uses, is more closely allied with white pine. Ponderosa is inferior to true white pine for some uses, and possibly is superior for other uses. It commonly sells at a lower price than true white pine so that there is a constant incentive to furnish ponderosa rather than true white pine when a contract merely calls for "white pine."

Respondents' product is ordinarily sold by the *producers* as "California white pine." It was marketed under this name in some of the far western States as early as 1886 and about 1915 shipments of ponderosa under this commercial name extended to the Atlantic Coast. Many producers of ponderosa in the so-called "Inland Empire" (Eastern Washington and Oregon, Idaho, and Western Montana) formerly sold their product as "Western white pine" (par. 29, R. 33). In 1924 the majority of them adopted the name "Pondosa pine" and this term is employed by the producers of slightly more than half of the ponderosa marketed (par. 33, R. 34). True white pine was widely known and used in this country many years before ponderosa lumber was first marketed.

Many of the purchasing public believe that any product designated by terms which include the

words "white pine" has the characteristics of true white pine and the use of the name "California white pine" thus causes confusion on the part of the purchasers and detriment both to producers of true white pine and to producers of ponderosa who do not market it under the name of white pine. (*Supra*, pp. 6, 7.)

This case presents the broad question whether, when a commercial name is used for two different products and therefore causes confusion, it is unfair for the producers with the lesser claim of right to the name to continue its use.[2] In other words, does the Federal Trade Commission Act authorize the Commission, where a commercial name was originally adopted without improper motive or purpose,[3] to compel use of more accurate and specific commercial names than those theretofore employed? There is also involved the subsidiary question of what degree of departure from the true meaning of a commercial name makes its use unfair.

We believe that there has been no case where this Court has considered these questions. *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258

[2] It should be noted that the Commission's orders would not prevent respondents from advertising their product as having most of the qualities and characteristics of white pine.

[3] The Commission found that the respondents desire to continue use of trade terms, including the words "white pine", because these words associate ponderosa in the market with true white pine and afford respondents a substantial monetary sales advantage (par. 31, R. 34).

U.S. 483, held that use of the labels "Natural Merino", "Gray Wool", etc., for products which were in large part cotton was an unfair method of competition, although these labels had long been established in the trade and were generally understood by it as indicating goods partly of cotton. But the labels in question were indubitably false. Under these circumstances, as long as any deception resulted, their use was an unfair method of competition.

Cases involving deceptive trade names, commercial names, labels, or trade designations have become among the most important of those presented to the Commission under the Trade Commission Act. While precisely the same combination of circumstances may not arise in any other case, we believe that a review of the decision below by this Court will be of great assistance to the Commission in administering the Act. A review by this Court will tend to chart the authority of the Commission to compel abandonment of commercial names which are not patently false, but which nevertheless cause an important amount of confusion in the trade.

II. The second question of law of general importance is whether the statutory requirement that a proceeding be in the public interest permits the Commission or the court to consider the general social or economic effects which may indirectly result from the Commission's order.

The court below held that the Commission's orders are not in the interest of the public because they tend to stimulate the cutting of true white pine, the supply of which is far more limited than that of the ponderosa, thus promoting "the premature cutting of second growth timber" (R. 1898). It said (R. 1898):

> The public is not only interested in not being deceived in the material it purchases under a certain nomenclature, but possibly in an even larger sense in the conservation of the forests.

We submit that the public interest required by the statute is the interest of the public in being protected against unfair methods of competition. Every aspect of this question is relevant. But the statute does not mean that the public interest in preventing unfair competition is to be balanced against some other social or national interest, such as conservation of natural resources. For example, it does not mean that if a manufacturer is more just than his competitors in his treatment of employees, he may therefore be immune from a proceeding against him by the Commission to prevent him from selling his goods by means of false representations.

The holding by the court below that, in passing upon the public interest of the proceeding, it might consider indirect effects extraneous to those inci-

dent to the question of unfair competition tends to create uncertainty as to the meaning of the law. If the case is followed by other courts, the decision in cases arising under the Trade Commission Act may turn upon the divergent views of different courts upon questions of national policy wholly collateral to the issues directly involved.

III. A further reason for granting a writ of certiorari is that this is a case where large interests are involved and where the court below failed to observe the statutory provisions governing judicial review of orders of the Commission.

This is a test case which affects the entire white pine and ponderosa industries. Not only the respondents but also producers of white pine and producers of ponderosa who do not use a commercial name including the words " white pine ", are concerned with the outcome of this litigation. In the court below a brief in support of the Commission's orders was filed *amicus curiae* on behalf of nearly forty of respondents' competitors.

Under the Trade Commission Act the Commission's findings of fact are conclusive "if supported by testimony ", but what is an unfair method of competition is a conclusion of law which the courts must ultimately decide. Accordingly, the proper function of a reviewing court is to decide whether, upon the basis of the facts found by the Commission which testimony supports, the method of competition under attack is or is not unfair.

We submit that the court below did not observe these limitations upon its jurisdiction. It treated the Commission's ultimate conclusion, that respondents use an unfair method of competition, as a finding of fact. It therefore examined the testimony, not to determine which findings the testimony supported, but to determine whether they supported the Commission's ultimate conclusion. The necessary effect of this kind of a review is to substitute the judgment of the court upon the facts for that of the Commission.

Of the Commission's eighty specific findings of fact, the court discussed only one, and did not state that this one was not supported by testimony. But the court appraised for itself the weight of certain testimony and drew its own inferences concerning the facts. Thus, with reference to testimony that California white pine connotes to certain persons, including architects, white pine in general, the court said (R. 1895):

> Just why architects and lumber dealers should be confused in view of the aid and assistance furnished by the Government through the Bureau of Standards is not readily apparent. It may properly be assumed that architects have a general knowledge of the qualities of the various materials they specify.

The court also said (R. 1894):

> The weight to be given to testimony above outlined upon the question of the relative

> durability of the two lumbers is not as clear as it might otherwise seem to be, viewed in the light of other facts and circumstances.

It said that the inclusion of the name "California white pine" in a Simplified Practice Recommendation of the Bureau of Standards was "persuasive in a case of this character" and might be "decisive" (R. 1892).

The proper limitation upon the function of the court in reviewing an order of the Commission under the Trade Commission Act was stated in *Federal Trade Commission* v. *Pacific States Paper Trade Association*, 273 U.S. 52, 63:

> The weight to be given to the facts and circumstances admitted, as well as the inferences reasonably to be drawn from them, is for the commission.

This Court cannot properly be asked to review every erroneous decision of a Circuit Court of Appeals. But we believe that there has been a recent tendency on the part of these courts to weigh the evidence in Federal Trade Commission cases and to set aside the Commission's orders when their views as to preponderance differ from those of the Commission. This tendency, if it exists, is particularly insidious where the court, as here, does not discuss the evidence from the standpoint of its sufficiency to support the Commission's findings of fact, but from the standpoint of its sufficiency to support the ultimate conclusion that the method of competition

was unfair. When, furthermore, this error occurs in a case affecting substantially all producers in a large group of an industry, a question of sufficient general importance to warrant review by this Court would seem to be presented.

Wherefore, it is respectfully submitted that the petition for writ of certiorari should be granted.

J. CRAWFORD BIGGS,
Solicitor General.

ROBERT E. HEALY,
Chief Counsel,
Federal Trade Commission.

JULY 1933.

APPENDIX

Section 5 of the Federal Trade Commission Act, c. 311, 38 Stat. 717, 719 (U.S. Code, Title 15, Sec. 45), provides, *inter alia:*

> That unfair methods of competition in commerce are hereby declared unlawful.
>
> The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.
>
> Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may

make application, and upon good cause shown may be allowed by the commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such per-

son, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of

appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

* * * * *

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